LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 26 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO RECALL AND AMEND THE JUDGMENT

EUGENE UNDERWOOD,
Counsel for Respondent,
26 Broadway,
New York, New York.

WILLIAM M. KIMBALL,
H. BARTON WILLIAMS,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1957

No. 350

PASQUALE PALERMO,

Petitioner,

against

LUCKENBACH STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO RECALL AND AMEND THE JUDGMENT

Petitioner's brief in opposition misconceives respondent's position. *Neese* v. *Southern Railway Co.*, 350 U. S. 77, upon which petitioner relies, is not in point. In *Neese*, the trial court granted the new trial motion on the ground of excessiveness subject to a remittitur. Here, on the contrary, the trial court refused to consider the merits of respondent's motion on the ground of excessiveness because it deemed itself powerless to grant such a motion. Respondent argued to the Court of Appeals that the District Court did have such power and should have considered the motion on its merits, as was done in *Neese*. The District Court's determination is contrary to the Court of Appeals' decisions in *Comiskey* v. *Pennsylvania Railroad Co.*, 228 F. 2d 687 and *Herring* v. *Luckenbach S.S. Co., Inc.*, 137 F. 2d 598.

Respondent did not ask the Court of Appeals to grant its motion for a new trial, as did the Railroad in *Neese*, but only asked the Court of Appeals to remand, so that the District Court might consider respondent's motion on the merits and exercise powers which the District Court erroneously thought were non-existent. The Court of Appeals expressly refrained from deciding whether to do that because it reversed on another ground.

Petitioner argues that, in holding that the jury was properly instructed as to the effect to be given to contributory negligence, this Court implicitly decided the two points expressly left undecided by the Court of Appeals. That conclusion does not follow. The two undecided questions do not relate to the propriety of the charge. Properly charged juries can and do return excessive verdicts. The undecided questions concern the power and duty of the trial judge, on respondent's new trial motion for excessiveness, to consider whether the jury actually followed his instructions by making an adequate and proper reduction for contributory negligence; and his power and duty to grant a new trial if he found the verdict to be excessive, even though there may have been sufficient evidence of liability to justify recovery by petitioner in some amount.

Respondent has moved to recall and amend the judgment so that these timely raised and undecided questions may be passed upon by an appellate court. It is respectfully submitted that the motion should be granted.

Dated: New York, New York,
December 20, 1957.

EUGENE UNDERWOOD,
Counsel for Respondent.

WILLIAM M. KIMBALL,
H. BARTON WILLIAMS
of Counsel.